No. 89-1108 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

JANICE BIRNBAUM and SAUL BIRNBAUM, as Executors, and ILENE L. FLAUM and CENTRAL TRUST COMPANY, as Temporary Co-Administrators c.t.a. of the Estate of Bernard P. Birnbaum, Deceased,

Petitioners,

against

THE STATE OF NEW YORK,

Respondent.

DOL No. 82002380

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief in Opposition to Petition for Writ of Certiorari

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Dated: March 7, 1990

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(3847)

Counter Statement of Question Presented

Whether a taking of property occurs when the State, pursuant to an applicable regulation, requires a nursing home that seeks to close to remain open for a reasonable time to permit alternative arrangements to be made for the continued care of its patients.

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Counterstatement of the Case

Bernard P. Birnbaum died on February 13, 1976. He had been the licensed operator of the Abbott Manor Nursing Home, an 84 bed, skilled nursing facility, located in Buf-

falo, New York (App 53a, 55a).[1] The State Department of Health ("Department") was notified of Mr. Birnbaum's death by a co-executor of the Estate on or about February 14, 1976. By letter dated February 27, 1976, the Department notified the co-executor that (App 54a):

> "Due to the recent death of your brother who was the sole proprietor of the Abbott Manor Nursing Home, the facility no longer has a legally established operator. By means of this letter, you, as the Executor of the Estate of Bernard P. Birnbaum, are being put on notice that any change or transfer of ownership must first be approved by the State Public Health Council.
>
> * * *
>
> "If termination of the operation of the facility as a health facility—i.e., as a nursing home or health related facility—is being considered, I need to be notified as soon as possible and procedures for closing the nursing home will be sent to you."

The nursing home's operating certificate was continued in effect by the Department to allow the Estate to operate the nursing home during an interim period under authority of Department regulation 10 NYCRR 401.1(c), which provides (App 56a-57a):

> "Upon the death of any person, party or member of a partnership to whom an operating certificate has been issued, the commissioner may extend the expiration date of such certificate for such time as in his discretion shall be required for the transfer of such decedent's interest in the facility, for the processing

[1] Refers to the appendix attached to the petition.

> of an application to the State Public Health Council for approval of establishment of a transferee of such decedent's interest and for the processing of an application for an operating certificate on behalf of such transferee."

During the Spring and summer of 1976, the co-executors continued to operate the nursing home. During this period a series of meetings, telephone conversations and exchanges of correspondence took place between the representatives of the Estate and the Department which, based upon the differing allegations of the parties, are described in detail in the New York State Court of Claims memorandum decision (App 58a-70a). Suffice it to say that the parties at that time explored the possibility of a counsensual receivership, transfer of the nursing home to a new operator, and an increase in the Medicaid reimbursement rate for the facility (App 57a-60a). The representatives of the Estate and the Department could not agree on the terms of a receivership and a party could not be located who was willing to acquire or take over the operation of the facility (App 58a-70a).

At that time, approximately 70% of the nursing home's patients received benefits under the Medicaid program and the remainder either paid for their own care or received benefits under the Medicare program (App 55a). The nursing home's prospective Medicaid reimbursement rate was established yearly by the State Commissioner of Health ("Commissioner") pursuant to New York State Public Health Law §§ 2807 and 2808. The rate at that time was limited by law to those costs reasonably related to the efficient production of services at the nursing home and was established in accordance with the methodology set forth in the regulations of the Department (10 NYCRR Part 86-2). Nursing homes that were dissatisfied with the rate were entitled to administrative review (10 NYCRR Part 86-2) and further judicial review pursuant to the New York

State Civil Practice Law and Rules, Article 78. The Department had nothing to do with establishing the nursing home's Medicare care rate, which was done by the appropriate federal agency, nor with the private patient rate, which was established by the nursing home.

During the negotiations with the Department in the spring and summer of 1976, the co-executors claimed that the nursing home was losing $20,000 to $30,000 a month and that they were seeking full reimbursement from the Department for its operating costs (App 55a). The Department informed the Estate that it could do nothing beyond the legally authorized limits of the Medicaid reimbursement system (App 66a).

On September 3, 1976, the Estate had employees of the nursing home send telegrams to the next of kin of patients advising them that because the Department of Health refuses to pay medicine and medical care "* * * we are unable to continue [patient's] care" and "[a]ccordingly, you are advised to make the necessary arrangements to have your relative removed no later than September 7, 1976 at 7:00 p.m.". A somewhat fuller explanation was given in the case of non-Medicaid patients (App 70a).

Faced with a precipitous closure of the nursing home, the State, by order to show cause, containing a temporary restraining order, sought in the New York State Supreme Court, Erie County, to enjoin closure of the nursing home until it complied with the applicable provisions of the State Hospital Code (10 NYCRR Part 700) (App 70a-71a). At the time relevant to this proceeding, regulations 10 NYCRR 701.3(f) and 401.3(f)[2] provided that:

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[2]These requirements are now found in 10 NYCRR 401.3(g). Since the Court of Appeals refers to the latter provision in its decision (App 2a), references hereafter will be to 401.3(g).

> "No medical facility shall discontinue operation or surrender its operating certificate unless 90 days notice of its intention to do so is given to the commissioner and his written approval obtained."

The Department of Health interpreted this regulation to mean that a notice of intent to close, coupled with an acceptable orderly plan of closure, renders the Department powerless to prevent a closure.

The Estate, in its answer, opposed the granting of the injunction and counterclaimed for (1) the appointment of a receiver and (2) full compensation for the actual cost and value of the care and maintenance provided to patients (App 71a-72a).

By orders dated November 4, 1976 and November 26, 1976, the State Supreme Court (Kasler, J.) denied the State's application for an injunction, but directed the appointment of two long-term employees of the nursing home as co-receivers of Abbott Manor Nursing Home, *nunc pro tunc* as of October 20, 1976 (App 73a). The order of November 26, 1976, provided, *inter alia*, that the co-receivers were appointed pursuant to the equity power of the court to implement section 2810 of the New York State Public Health Law (App 74a).

By further order dated December 29, 1976, the State Supreme Court (Kasler, J.) determined that it was an administrative function of the Commissioner pursuant to Article 28 of the Public Health Law to pay the actual cost of care and treatment during the period of the receivership, and the Commissioner was ordered to pay to the co-receivers the actual cost of care under a voucher system devised by the court (App 79a). The State appealed that

order to the Appellate Division of the State Supreme Court (App 79a).

Thereafter followed a series of disputes, motions and hearings involving the co-receivers, the Estate and the State, over the amount of the Medicaid reimbursement rate of the nursing home, the fair rental to be paid to the Estate, and the Estate's claims (App 77a-87a). On January 10, 1978, the receivers, at the direction of the State Supreme Court (Kasler, J.), issued a 90-day notice of closure because of the continuing financial difficulties of the nursing home (App 80a). The State did not object and, in fact, opposed a motion to extend the receivership made by the co-receivers (App 86a-87a). Notably, the Estate did not object to the continuation of the receivership. Subsequently, the State Supreme Court (Kasler, J.) issued an order, dated May 8, 1978, which relieved the co-receivers of all duties and appointed the State Commissioner of Health as receiver of the Abbott Manor Nursing Home (App 87a). It directed that he (App 88a):

> "shall take full responsibility for all operating and maintenance expenses during the period of his appointment which appointment shall last until such order of this Court directs otherwise."

In addition, the Commissioner was directed to take responsibility for expenses of the terminated receivership. The State appealed this order by notice of appeal dated June 2, 1978 (App 88a).

Thereafter, the Supreme Court (Kasler, J.), by order dated May 25, 1978 and judgment dated July 21, 1978, reduced to judgment the amounts found due and owing to the Estate by the State, with respect to fair rental value, real estate taxes, moneys advanced to the receivership, reimbursement for all inventory and the proportionate alloca-

tion of Medicaid payments for October 1976. The State also appealed from that order and judgment (App 89a).

On November 2, 1979, the Appellate Division, Fourth Department, in a single opinion (App 122a-129a; 70 AD2d 434), decided the State's appeals, holding that the State Supreme Court had properly exercised "* * * its powers to appoint a receiver and direct that the operation of the Home be continued thereunder for the protection of the patients" (App 127a). However, it held that the State Supreme Court did not have jurisdiction to determine the consequent issues as to who should bear the operating losses not governed by regulations for patient care allowances and Medicaid, Medicare and patient fee payments, since the "Court of Claims has exclusive jurisdiction of issues as to the State's liability for tort and contract claims" (App 127a). The Appellate Division gave the Estate thirty days to file a notice of claim in the New York State Court of Claims. On December 18, 1980, the New York State Court of Appeals affirmed the Appellate Division for the reasons stated by that court (App 92a; 52 NY2d 766).

On December 20, 1978, the Estate sought and obtained a temporary restraining order which, *inter alia,* enjoined the transfer of the remaining patients from Abbott Manor, except by voluntary means. All patients were discharged from Abbott Manor prior to August 16, 1979. On September 13, 1979, the State Supreme Court (Kane, J.), over the objection of the Estate, ordered that "* * * the Plaintiff State of New York be relieved of any responsibility they [*sic*] may have for continued possession and maintenance, etc." of the nursing home (App 92a).

On November 30, 1979, the claimants filed their claim (No. 63695) in the New York State Court of Claims (App 41a). They claimed damages for the period from October

20, 1976 through November 30, 1979, on the grounds of an alleged *de facto* appropriation of the nursing home by the State's action in preventing closure of the nursing home and continuation of a losing business through the court-appointed receivership[3] (App 19a, 53a).

In April 1981, claimants moved for partial summary judgment with respect to Claim No. 63695 (App 53a).[4] They sought and were granted an award of damages for the period of October 20, 1976 to September 14, 1979 (App 51a).

The State, in opposing the motion, contended that in the midst of continuing discussions, the Estate attempted abruptly to close the nursing home. The only action taken by the State was to seek to restrain the precipitous closure and enforce its regulations to protect aged and infirm patients (10 NYCRR 401.3[g]). Had claimants complied with the regulations by submitting "* * * an acceptable plan of closure, they could have terminated the operation of the Abbott Manor within 90 days of notification of closure with the permission of the Commissioner" (App 107a).

The Court of Claims issued an 81-page memorandum decision on August 23, 1982 (App 50a-120a), holding that claimants were entitled to partial summary judgment because a taking had occurred. The Court of Claims held (App 115a):

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[3]Claim No. 63694, which was also filed, is not at issue here. It is a claim for damages for the pre-receivership period, alleging that the State by fraud and misrepresentation induced the Estate to keep the nursing home open after the death of the licensed operator to the financial detriment of the claimants (App 19a, 52a, 96a).

[4]Petitioner also moved for the summary judgment with respect to Claim No. 63694. That motion was denied because of the existence of triable issues of fact and is not at issue here (App 96a-97a).

> "that the imposition of the Receivership, a possessory remedy, by the Supreme Court of the State of New York as the remedial device to respond to the State's insistence that the Abbott Manor Nursing Home remain operative, the substantive terms of that receivership being adopted from the provisions of Section 2810 of the Public Health Law, constituted a 'temporary taking' which 'requires the Government to pay fair compensation to the owner of the property for its use' ".

The court held further that fair compensation for the use of the property may be measured by a "fair" monthly rental for the facility as well as compensation for any property used by the receivers (App 118a).

By order entered January 27, 1984, the Appellate Division, Fourth Department (143 AD2d 544), affirmed the award of partial summary judgment for the reasons stated in the Court of Claims decision (App 48a). On October 27, 1987, the Court of Claims entered a final judgment, which, in addition, awarded accountant and attorneys' fees. The Appellate Division, Fourth Department (143 AD2d 544) affirmed without opinion (App 14a). The Court of Appeals thereafter granted the State permission to appeal, which brought up for review the prior non-final grant of partial summary judgment (App 5a).

The Court of Appeals reversed. It found that the question in this case is "whether a 'taking' of property occurs giving rise to the obligation to pay fair compensation * * *, when the State requires a nursing home to remain open until reasonable alternative arrangements can be made for the continued care of the patients" (App 1). It held that under the facts and circumstances of this case "the State's actions, preventing the precipitous closing of a nursing home in contravention of the regulations of the Department of

Health, did not constitute a 'taking' of property under the Federal or State Constitutions" (App 1a).

The Court observed that the nursing home industry is subject to extensive regulation in New York State (App 5a). Since supply is tailored closely to demand, the closing of a facility poses a threat to the continuity of essential services. The court noted that Health Department regulation, 10 NYCRR 401.3(g), contemplates this predicament by requiring 90 days' notice of discontinuance and written approval of the Commissioner (App 6a).

The Court held that the application of 10 NYCRR 401.3(g), to require the continuation of nursing home services in Abbott Manor, did not immediately constitute a taking. The Estate was not prevented from selling the home and, in light of the existence of the State regulation, the State's prevention of the Estate's attempt to close Abbott Manor without reasonable prior notice did not, under any reasonable view, affect its investment backed expectations (App 8a-9a).

Moreover, even if the State's action were characterized as tantamount to a physical occupation of the property, a taking had not occurred. The Court agreed with the apparently unanimous view of the courts that have considered the question "* * * that under these circumstances the application of a regulation requiring that a business not terminate services, used for a reasonable period of time so that an agency may devise solutions accommodating the public and private interests, is a valid regulation and does not constitute a taking of private property for public use * * *" (citation omitted) (App 9a-10a).

In considering the delay in closing the nursing home, the Court held that it could not under the circumstances of this case find that such delay became a taking at some point.

Although the Estate argued that an application to close under 10 NYCRR 401.3(g) would have been futile because there were no alternative facilities available to care for Abbott Manor's patients, it never made such an application. Moreover, it appears on the record that soon after the Estate's unlawful attempt to close the nursing home, its desire to close the facility ceased. In conclusion, the Court noted that, most importantly, the Estate made no claim that the State required operation of the nursing home against its wishes beyond a reasonable time. Its arguments were limited to the contention that it had an absolute right to close Abbott Manor and that the State's initial intervention constituted a taking.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The decision of the New York Court of Appeals accords with settled takings jurisprudence.

The Court of Appeals found on this record that soon after the Estate unlawfully attempted to close Abbott Manor without compliance with the notice requirements of 10 NYCRR 401.3(g) that its desire to close the facility ceased (App 11a). Notably, it was the Estate that suggested the imposition of the receivership. As the Court of Appeals found, the State never required operation of the nursing home against its wishes beyond a reasonable time. The Estate has, however, claimed an absolute right to close immediately, notwithstanding that it was in a highly regulated industry that required compliance with State regulations, 10 NYCRR 401.3(g), before patients could be discharged. The Estate's position is that the State's initial intervention to protect patients by preventing the precipitous closing of Abbott Manor in contravention of the State regulation requiring 90 days' notice constituted a taking

(App 11a). The Court of Appeals' ad hoc determination that a taking did not occur under these circumstances is well within settled takings jurisprudence.

Contrary to the Estate's contentions, the decision in *Brooks-Scanlon Co. v. Railroad Comm'n,* 251 US 396 (1920), is not controlling in a case such as this. In its well reasoned decision, the Court of Appeals pointed out that modern cases have emphasized the narrowness of the *Brooks-Scanlon* rule. It noted "the limitation of a person's right to cease business operations consistently has been held not a *per se* taking where a pervasively regulated industry is involved, and there exists an administrative procedure requiring that permission be obtained from a regulatory agency before service to the public is terminated * * *" (citations omitted) (App 8a). Moreover, the regulated business may, for a reasonable time, be made to suffer interim reasonable losses, without compensation, while the agency devises solutions which accommodate both the public and private interests involved (App 8a).

The Court of Appeals ad hoc factual determination in this case, following settled precedents of this Court, establish that a taking has not occurred (App 8a-9a). *See, e.g., Penn Central Transportation Co. v. New York City,* 438 US 104, 124 (1978). The important public character of the State's action is obvious. It did nothing more than seek to protect aged and infirm patients by enforcing its regulation which prohibits the precipitous closure of nursing homes (App 107a). Clearly, the Estate's investment backed expectations were limited by the fact that it was barred specifically by regulation from immediately discontinuing services (App 8a). Moreover, the impact of the Estate's post-receivership losses are circumscribed by the fact that it did not manifest any desire to close the facility after its initial unlawful attempt to do so had failed (App 11a).

Even accepting the Estate's characterization of the State's actions here as tantamount to a physical occupation of the property, the Court of Appeals properly rejected that characterization as being dispositive of whether a taking had occurred under the circumstances of this case (App 9a). Relying on *Keystone Bituminous Coal Ass'n v. DeBenedictus,* 480 US 470, 491-492 (1987), it concluded "that the State may enforce the obligation, embodied in the regulations, that there shall not be immediate terminations of nursing home services, because that use of the property threatens an imminent injury to the public * * *."

The Court of Appeals has not in its holding here carved out any exceptions to this Court's taking jurisprudence. It has only applied the recognized obligation of a business in a highly regulated industry to obtain governmental approval before it ceases operation.

II.

This case does not involve important and recurring questions requiring this Court's consideration.

The Estate points to the decision in *Seawall Assocs v. City of New York,* 74 NY2d 92, *cert denied,* ____ US ____, 110 S Ct 500 (1989), as indicating that there apparently is confusion on the part of the Court of Appeals in particular, and state and federal courts in general, with respect to this Court's taking jurisprudence (Pet, p 22). Because of this purported confusion, the Estate contends that the petition should be granted. Of course, if there were a conflict between two decisions of New York's highest court, petitioners should look to that court for resolution of the conflict. The Court of Appeals decision in *Seawall,* however, does not conflict with that court's ruling in this case.

In *Seawall*, the Court of Appeals held a local law facially invalid as both a physical and regulatory taking. The local law in issue prohibited the demolition, alteration or conversion of single-room occupancy properties and obligated the owners to restore all units to habitable condition and lease them at controlled rents for an indefinite period. 74 NY2d at 99. That local law contrasts sharply with State regulation, 10 NYCRR 401.3(g), applied in this case.

As already noted, that 90-day notice regulation required only that a nursing home remain oper for a reasonable period of time while the governmental agency devised a solution accommodating the public and private interests involved (App 10a). The Court of Appeals ad hoc determination that a taking did not occur as a result of the enforcement of that regulation in this case is neither inconsistent with the *Seawall* decision nor, as indicated in our first point, contrary to settled takings jurisprudence.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Dated: Albany, New York
March 7, 1990

Respectfully submitted,

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